FILED
MAY 18 1954
HAROLD B. WILLEY, Clerk

No. [redacted]

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

KWIKSET LOCKS, INC.,
Petitioner,

vs.

CARL A. HILLGREN,
Respondent.

PETITION FOR CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRED H. MILLER, Esq.
706 Cairns Building
108 West 6th Street
Los Angeles 14, California
Attorney for Petitioner.

TOPICAL INDEX

	Page
Opinions Below	2
Jurisdictional Statement	2
Questions Presented for Review	4
Rule 52(a) of the Federal Rules of Civil Procedure Is Involved	6
Statement of Facts	6
Argument	15
Conclusion	26
Certificate of Counsel	27

TABLE OF CASES AND AUTHORITIES CITED

Cases

Kemart Corp. v. Printing Arts Research Lab., Inc., 201 F. 2d 624, 627, 628	15
United States v. Esnault-Pelterie, 303 U. S. 26, 30	15

Statutes

Rule 13(b), Federal Rules of Civil Procedure	6
Rule 52(a), Federal Rules of Civil Procedure	4, 5, 6, 14, 15, 16, 25, 26
Title 28 U.S.C.A. 1388(a)	6
Title 28 U. S. Code Section 1254	3

IN THE

SUPREME COURT

OF THE

United States

October Term, 1953

KWIKSET LOCKS, INC., *Petitioner,* vs. CARL A. HILLGREN, *Respondent.*	No. 698

PETITION FOR CROSS WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of United States:

Your Petitioner, Kwikset Locks, Inc., respectfully prays that a cross writ of certiorari be issue by the United States Court of Appeals for the Ninth Circuit to review the decision of That Court to the effect that United States Letters Patent No. 2,489, 160 issued November 22, 1949 to Kwikset Locks, Inc. as the assignee of Adolf Schoepe and Albert S. Lord is valid but not infringed.

OPINIONS BELOW

The Opinion of the District Court is in the form of a Minute Order appearing at page 21 of the Record heretofore filed by Petitioner Carl A. Hillgren.

A first Opinion rendered by the Court of Appeals for the Ninth Circuit was entered on March 16, 1953 and appears at 97 U.S.P.Q. 206. This first Opinion has not otherwise been reported and is not included in the Record on file. A copy of the first Opinion is attached hereto.

Following the granting of a petition for rehearing in which the first Opinion was vacated, a second Opinion was entered and appears in the Record on file at pages 898-914. This Opinion is reported at 100 U.S. P.Q. 289, ... F (2d) .....

JURISDICTIONAL STATEMENT

The date that the original Judgment was entered is March 16, 1953. The date on which Petition for Rehearing was granted was April 28, 1953, on which date the original Judgment and Opinion were ordered vacated.

The Opinion and Judgment sought to be reviewed were entered on February 3, 1954.

A second Petition for Rehearing of Kwikset Locks, Inc., et al filed March 4, 1954 was denied March 22, 1954.

By order staying issuance of mandate entered March 29, 1954, the mandate of the Court of Appeals for the Ninth Circuit was stayed pending the filing and consideration and disposition by the Supreme Court of the United States of a Petition for Writ of Certiorari to be made by appellee, Carl A. Hillgren, providing such petition is filed in the Clerk's office of the Supreme Court of the United States on or before April 26, 1954. In the event the Petition for Writ of Certiorari is granted then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28 U. S. Code Section 1254.

A certified transcript of the Record in this case, including some of the proceedings in the Court of Appeals has been heretofore furnished by Petitioner Carl A. Hillgren.

QUESTIONS PRESENTED FOR REVIEW

1. As a finding of infringement of a patent for a finding of fact which cannot be set aside by an appellate court under Rule 52(a), Federal Rules of Civil Procedure, is it proper for the appellate court to set it aside when

(a) There is a serious dispute between the parties as to the manner in which the accused construction is made, which dispute was resolved by the trial court in favor of a finding of infringement?

(b) Statements made in the first opinion of the appellate court clearly indicate that the reviewing court did not understand how the alleged infringed construction was made as found by the trial court, which errors have since been acknowledged by the reviewing court by the vacating of the first opinion and the judgment entered thereon?

(c) Statements made in the second and present opinion still clearly indicate that the reviewing court has failed to comprehend clearly how the patented construction is made and how the alleged infringing construction is made?

(d) The reviewing court in its opinion has attributed to certain elements in the patented construction certain functions and has stated that these functions are lacking in the accused construction, whereas, as a matter of fact, the trial

court by resolving the despute as to the manner in which the accused construction has found that these functions are performed by the corresponding elements in the accused construction?

2. Where the appellate court seeks to review and reverse a finding of infringement of a patent by reference to the method by which the accused article is made and there is a serious dispute between the parties as to the method by which the accused article is made, can the appellate court ignore the findings of the trial court, place its own interpretation on the evidence, and reverse the finding of infringement in spite of the provisions of Rule 52(a)?

3. Where an appellate court seeks to review and reverse a finding of infringement of a patent claim containing the word "annular", is it proper for the appellate court to place its own restrictive interpretation upon that word in a manner contrary to the interpretation placed upon the same word in the same claim by the examiner in the Patent Office who allowed the claims in the first instance?

5. Where an appellate court seeks to review and reverse a finding of infringement, can it do so under Rule 52(a) by attributing certain functions to certain elements in the patented structure and stating that these are lacking in the accused structure where the method of manufacture of the accused structure is in dispute and has been resolved by the trial court who not only saw and heard the witnesses but also saw their

explanatory gestures, incapable of being reproduced in the Record?

RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS INVOLVED

The pertinent portions of Rule 52(a) of the Rules of Civil Procedure which are involved in this petition read as follows:

> "Rule 52(a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . Findings of Fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF FACTS

Plaintiff Hillgren brought suit against the defendants, Kwikset Locks et al, alleging that defendants were infringing the Hillgren Patent No. 2,403,597, issued July 9, 1946, for a Door Lock.

Jurisdiction of the District Court was invoked under 28 USCA 1388 (a).

Under the provisions of Rule 13(b) of the Federal Rules of Civil Procedure the defendant, Kwikset Locks, Inc., counterclaimed alleging that the plaintiff

Hillgren was infringing Patent No. 2,489,160, issued November 22, 1949, to Kwikset Locks, Inc. as assignee of Adolf Schoepe and Albert S. Lord. A copy of that patent appears in the Book of Exhibits at page 850.

The Trial Court in a memorandum opinion (R. 21) found that Kwikset Locks, Inc. had infringed plaintiff's patent.

> "The Court finds that plaintiff has infringed defendant's patent, as set forth in the counterclaim filed in this action, ..."

Appropriate findings of fact and conclusions of law were entered pursuant to this memorandum opinion (R. 22 to 30.) Included in these findings are the following:

> "25.
>
> "The structure of a door knob comprising an insert applicable to a door lock spindle with a shell around the insert, the shell and insert presenting annular portions in close proximity to each other, and a cap closing the outer end of the shell having a flange disposed between the annular portions spread by the annular portion on the insert beneath the annular portion on the shell and having a tight fit with the annular portions was new in the art.
>
> "26.
>
> "The method of making the door knob and the structure resulting therefrom wherein an insert applicable to a door lock spindle and a surrounding shell are assembled together with both parts pre-

senting annular portions near their outer ends and driving a flanged cap onto the insert so that its flange is spread by the insert beneath the annular portion on the cap and is held against springback by the continued engagement between flange and the insert, was new over the art and involved invention over what was known in the art.

"27.

"The knobs manufactured and sold by the plaintiff, Carl A. Hillgren, embodied the invention of the defendants' patent No. 2,489,160, and therefore infringe the claims of said patent.

"28.

"The knobs manufactured and sold by the plaintiff, Carl A. Hillgren, are but colorable variations of the invention disclosed in patent No. 2,489,160.

"29.

"The knobs manufactured and sold by the plaintiff, Carl A. Hillgren, are the mechanical equivalents of what is disclosed and claimed in patent No. 2,489,160."

Both parties appealed to the Court of Appeals for the Ninth Circuit from the judgment entered by the District Court in this case. In the defendant's appeal the Hillgren patent was originally and ultimately held to be invalid and not infringed. In the plaintiffs' appeal the plaintiffs' patent was held by the Court of Appeals to be valid, the court stating (R. 910)

"The District Court has found that Kwikset's fitting or method of making a door knob is new

and involves invention over the prior art and we think the evidence supports the finding."

In the original opinion, a copy of which is attached hereto, the Court of Appeals proceeded to ignore the findings above quoted, to place its own interpretation on the evidence, and to conclude that the plaintiffs' door knobs, one of which is illustrated at the lower right-hand corner of (R. 911), a page of the Opinion of the Court of Appeals, were not an infringement for the reasons therein stated. These reasons were acknowledged by the Court of Appeals for the Ninth Circuit to be erroneous. In the granting of Kwikset's Petition for Rehearing and following the rehearing a new opinion was entered wherein the findings of the Trial Court were again ignored and the plaintiff's knob found not to be an infringement for the new reasons presented in the second opinion (R. 908-913).

In the second opinion of the Court of Appeals statements are made which indicate

1) That the Court of Appeals was of the erroneous view that the manner in which the plaintiff's knobs were made was not in dispute.

2) That the Court of Appeals was not aware that the dispute pertaining to the manner in which the plaintiff's knobs were manufactured had been resolved by the Trial Court who had the benefit not only of seeing and hearing the witnesses and judging as to their credibility, but also had the

opportunity of observing their explanatory gestures as to how the accused knobs were made.

3) Statements are made in the opinion indicating that the Court of Appeals, even in its second opinion, has a misconception of how the defendant's knobs disclosed in the patent are made and how the accused knobs manufactured by the plaintiff are made.

Other pertinent facts having an important bearing on this controversy are as follows. While the defendants' knob patent No. 2,489,160 was pending in the Patent Office, one Nels H. Seaholm had filed an application for a patent on a door knob which matured into Patent No. 2,517,803, issued Aug. 8, 1950, a copy of which is attached hereto. This patent was issued to the plaintiff, Carl A. Hillgren, as assignee and was offered in evidence at pages 384 and 385 of the Record as Ex. 13. During the course of the trial Hillgren's counsel asserted that this patent was the patent under which the plaintiff Hillgren was manufacturing the accused knobs, at page 55 of the record:

"The Court: Can I ask a question?

"Mr. Jamieson: Surely.

"The Court: Is that the patent (the Seaholm patent) on which you are relying?

"Mr. Jamieson: No. This is the patent on the counterclaim, you see, *that we are manufacturing under*. It is rather confused, I will admit." (Underscoring added.)

At R. 778 Hillgren's witness Lord testified on direct examination by Hillgren's attorney as follows:

"Q. Are you familiar with the knob that is now manufactured by the Hillgren Company that is the accused knob in this lawsuit?

"A. Yes.

"Q. I will show you a copy of the patent to Seaholm, that being Exhibit 13, and also an example of the accused structure, being Exhibit 8, and I will ask you to describe to the court the method of manufacturing that device.

"A. Well, in the first place, on Hillgren's knob and insert, the knob is not completed before the insert is put in. The walls are left straight on this—instead of being curled over like that, it is left straight.

"Then the insert is put in, they bring the press down over it, and it forms that shell over the insert.

"Q. We have an exhibit here that shows that I think. Exhibit D has been offered in evidence.

"A. Well, that shell is brought over that insert and formed around it. Then the cap—

"Q. Pardon me before you go any further. At that stage, is there any pressure between the circular opening of the shell and the insert?

"A. No. That is to get the insert into the shell.

"Q. Continue.

"A. And then the cap is put on, slipped on there, and the insert is used as a die to curl the lower part of that cap up into the curl of the knob.

"Q. At that point does the flange of the cap slide easily between the insert and the outside shell as shown in Exhibit D?

"A. Yes. It fits freely into that.

"Q. So that there is more space between the insert and the shell than the thickness of the flange on the cap?

"A. That's right.

"Q. Then after you have used the central insert as an anvil or die to flare the flange on the cap outwardly, what is the next step in making the accused structure?

"A. Well, that is the finished part then. The insert is not really used to do anything from there on out.

"Q. Isn't there a crimping process after that between the cap and the shell?

"A. Yes.

"Q. You didn't mention that.

"A. After this shell is wrapped around and the insert is in, then the cap is put in and the insert is used as merely a die to fold that flange up underneath the rounding on the top of the shell.

"Q. After that is done, is there another die that presses the shell inwardly against the cap?

"A. No. The cap is actually spread out on that insert."

The Seaholm patent therefore is acknowledged to have correctly illustrated the manner in which the accused knobs manufactured by the plaintiff were made. During the period that the defendant Kwikset's patent was copending in the Patent Office with the Seaholm patent the Examiner recognized the similarity between the structure and method of manufac-

ture between the disclosure made in the defendant's patent and the Seaholm application and proposed an interference. He consequently sent a letter to Seaholm's attorney quoting verbatim a claim which ultimately became claim 3 of the Kwikset patent, see Plaintiff's Ex. 9A, Ex. Bk. 843 and 844. Seaholm was given thirty days from August 23, 1949, in which to file the statement required by Patent Office Rule 202 for the purpose of determining whether or not an interference should be declared. He did not do so within the time allowed and having thus defaulted no interference was declared. This action on the part of the Examiner, petitioner regards as highly significant because it indicates that the Examiner who allowed Claim 3 of the Kwikset patent was under the impression that the exact wording of this claim, including the word "annular" applied to the disclosure in the Seaholm patent which admittedly discloses Hillgren's door knobs alleged by Kwikset to be an infringement of its patent.

Another significant fact is that during the pendency of the application for the Kwikset patent a petition was filed with the Commissioner of Patents requesting that the Kwikset application be made special because of the then infringement being conducted by the plaintiff Hillgren. In support of the petition to have the Kwikset application made special a showing was made of the character of door knob then being manufactured by the plaintiff Hillgren. After due consideration, the Kwikset application was made special by order of the Assistant Commissioner of Patents. In making the

application special the Assistant Commissioner of Patents must have been of the opinion that the Hillgren knob was a present infringement justifying speedier than normal action on the application so that the infringement might be speedily stopped. Had the Assistant Examiner been of the opinion that the Hillgren knob was not an infringement he would have refused to have made the application special.

There are thus three independent opinions of proper tribunals to the effect that the plaintiff's knobs are an infringement of the Kwikset patent in suit. These are

1) The Examiner who granted the Kwikset claims and who proposed the interference between the Kwikset application and the Seaholm application which admittedly discloses the accused knob.

2) The Asssitant Commissioner of Patents who felt justified in making the Kwikset application special on the showing of infringement made.

3) The Trial Court who held that there was infringement and entered the findings above quoted.

The issue presented in this petition is primarily whether the Court of Appeals is justified in ignoring the express provisions of Rule 52(a) and in reversing the Trial Court on a finding of infringement which is not clearly erroneous and which is almost universally regarded as a finding of fact.

ARGUMENT

Rule 52(a) provides

> "Findings of fact shall not be set aside unless clearly erroneous."

The question of infringement is generally held to be a question of fact and findings concerning the question of infringement are generally held to be findings of fact.

The excuses given for a reviewing court setting aside a finding of infringement is that where

> "the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law . . ." (See *Opinion,* R. 910).

But when does the Appellate Court "clearly comprehend" and when does it only mistakenly believe that it "clearly comprehend(s)?" In the present case there is a clear dispute as to how the patented knob is made both as to the disclosure in the patent and as to the actual manufactured construction of the knob itself. This dispute clearly indicates that herein the Appellate Court does not "clearly comprehend" what was disclosed in the patent and how the patented knob is made. Therefore, the rule of *Kemart Corp. v. Printing Arts Research Lab., Inc.,* 201 F. 2d 624, 627, 628, and the rule of *United States v. Esnault-Pelterie,* 303 U. S. 26, 30, does not apply. There is no justification

for the Appellate Court setting aside finding of fact of infringement under Rule 52(a) because the Appellate Court lacks in this clear comprehension. To demonstrate this lack of clear comprehension we point to statements made in the opinion which indicate it.

At page 909 of the Record the Court of Appeals in its second and final opinion states:

> "An examination of the Kwikset knob shell, which is the part grasped by the hand in using it, discloses that the top edge of the shell is curved or curled inwardly *so as to fit tightly* against a complementary concave area at the top, outside edge of the insert."

This statement is contrary to fact.

During the course of the trial Hillgren's counsel requested Kwikset to produce the assembly of just the shell and the insert prior to the application of the cap, see R. 772 and 773. This request was complied with over the noon recess and the physical exhibit was introduced in evidence as Defendants' Ex. MM. This physical exhibit clearly shows that the above quoted statement in the opinion of the Court of Appeals is not in accordance with fact.

> "An examination of the Kwikset knob shell . . . discloses that the top edge of the shell is curved or curled inwardly . . ."

But it does not "fit tightly against a complementary concave area at the top outside edge of the insert."

On the contrary there is a decided space between the surface of the curl and the top outside edge of the insert. A thin flexible material can be readily passed between the top outside edge of the insert and the surface of the curl down into the interior of the shell. The so-called tight fit conseqquently does not exist in the "Kwikset knob shell." Furthermore, this tight fit is contrary to the teachings of the patent. In the patent, Ex. Bk. 850, column 2, line 36 et seq, it is stated:

> "In assembling the insert 20 with the shell the insert is placed in the shell and is forced downwardly through the curl 19 the extension 24 spreading the curl tightly. The assembly is performed in a die on a punch press . . . ."

As the top outside edge of the insert is chamfered or beveled off and is consequently of reduced diameter as compared with the maximum diameter of the extension 24 as stated in column 2, lines 34 and 35, and the curl 19 is opposite this chamfered edge, it is obvious that there cannot be a tight fit between the curl 19 and the chamfer. The curl 19 in passing up over the maximum diameter of the extension 24 is expanded slightly but when it reaches its uppermost position opposite the chamfer the curl is then opposite a surface of smaller diameter and consequently no tight fit could exist. This is conclusively established by the physical Ex. MM.

The above-quoted erroneous statement in the opinion is the starting point of the erroneous conclusion to which the Court of Appeals arrives with respect to

infringement. Near the end of the opinion (R. 912) the Court of Appeals makes this observation:

> "To more clearly contrast the essentials of the two knobs, we summarize as follows: Both knobs utilize the insert as a die. To that extent they are similar. However, there is a substantial difference in the principles of construction of the two knobs which is reflected in the methods by which they are assembled, to-wit: *In the Kwikset knob, it is important that initially there be a tight fit between the shell curl and the insert in order that sufficient spring-back be created in the shell curl to hold the cap in place.* By the way of comparison, in the assembly of the Hillgren knob there is a space between the insert and the shell edge through which the cap flange is forced. . . ."

This distinction is not supported by the patent nor by Ex. MM and the Court of Appeals consequently failed to clearly comprehend all of the similarities between Kwikset's patented knob and Hillgren's accused knob. In both the patented knob and in the accused knob the insert functions as a die to spread the cap flange beneath the outer edge of the shell. In the course of such spreading of the cap flange the cap flange is expanded against the edge of the shell regardless of whether the edge of the shell is in the form of a broad curl or whether it is in the form of a thin edge as in the accused Hillgren knob. In both knobs the spreading of the cap flange by the insert which is used as the die beneath the edge of the shell, locks the cap in position and against withdrawal. In both knobs the

spreading of the cap flange against the edge of the shell makes a tight fit between the cap flange and the edge of the shell regardless of whether the edge of the shell is curled or not. In both knobs, as the die provided by the insert remains behind the spread cap flange, the cap flange is held against springing back and the tight fit is preserved.

The difference between the patented knob and the accused knob is nothing more than one of degree. The patented knob uses a relatively broad edge or tongue at the outer end of the shell which is formed by the curl. The accused knob uses a narrow edge or tongue in the outer edge of the shell. The patented knob has the die flare the cap flange only slightly beneath the outer edge of the shell. The accused knob flares the cap flange to a greater extent beneath the edge of the shell. These differences in degree employing the same principle do not avoid infringement. While the Court refers to the Hillgren knob as employing a tongue and groove principle (R. 913) the same tongue and groove principle appears in the patented knob, the only difference being that a broader tongue afforded by the curl and a broader groove in the cap flange is present.

The Court at R. 911 undertakes to attribute to the word "annular" a peculiar and highly limited interpretation, see Footnote 19 appearing at the bottom of R. 911. By imposing on the word "annular" a peculiar and restricted interpretation the Court attempts to set up a further basis for justifying its holding of non-infringement. However, as above pointed out, the

Examiner who allowed claims 3 to 6 of the Kwikset patent containing the word "annular" regarded this word as being equally applicable to the accused knob as depicted in the Seaholm application, and consequently quoted claim 3 verbatim for interference purposes. The Examiner thus interpreted this word to be broad enough to be applicable to the disclosure made in the Seaholm application. Certainly, when the Examiner knowingly and intentionally allowed the claims containing this word and interpreting the word as being of this breadth, it is unfair to the patentee for the Appellate Court to disregard entirely his interpretation of the claim and to place a more restricted interpretation on the claim so that the construction shown in the Seaholm patent is no longer held to infringe. The Court, in its interpretation of the claim, should act consistently with the interpretation of it placed upon it by the Examiner who allowed it.

Part of the basis on which the Court of Appeals bases its conclusion of non-infringement is predicated on the theory that Hillgren applies lateral pressure to the sides of the shell while applying the cap and Kwikset does not do this according to the patent. This application of lateral pressure to the sides of the Hillgren shell is emphasized in the opinion as follows (R. 912):

> "Then the (Hillgren) cap is forced down upon the insert *while the sides of the shell are forced laterally toward the insert. Under the dual pressure* the Hillgren cap flange is forced between the shell and the curved portion of the insert. . . ."

Again at R. 913:

> "By way of comparison, in the assembly of the Hillgren knob there is a space between the insert and the shell edge through which the cap flange is forced *and an inward lateral pressure is placed upon the shell to keep its edge in position.* . . ."

This question of whether or not Hillgren applies lateral pressure to the sides of the shell is in dispute. Kwikset contends and has contended that no application of lateral pressure is in fact applied and also that it is unnecessary for the following reasons:

1) The application of lateral pressure to the sides of the shell is unnecessary in the Kwikset patented knob.

2) The application of lateral pressure to the sides of the Hillgren knob is likewise unnecessary.

3) It is difficult to conceive of a die which would move down on top of the cap to force the cap down against the insert and which would at the same time, during its downward movement, apply lateral pressure to the sides of the Hillgren shell.

4) No mention whatsoever is made of the application of lateral pressure during the application of the cap in the Seaholm patent which is the patent that the Trial Court was informed that Hillgren was "manufacturing under" (R. 55) as follows:

"The Court: Can I ask you a question?

"Mr. Jamieson: Surely.

"The Court: Is that the patent on which you are relying?

"Mr. Jamieson: No. This is the patent (Seaholm) on the counterclaim, you see, *that we are manufacturing under.* It is rather confused, I will admit."

At R. 778 et seq. the witness Lord gives some rather confusing testimony as follows:

"Q. Are you familiar with the knob that is now manufactured by the Hillgren Company that is the accused knob in this lawsuit? A. Yes.

"Q. I will show you a copy of the patent to Seaholm, that being Exhibit 13, and also an example of the accused structure, being Exhibit 8, and I will ask you to describe to the court the method of manufacturing that device.

"A. Well, in the first place, on Hillgren's knob and insert, the knob is not completed before the insert is put in. The walls are left straight on this—instead of being curled over like that, it is left straight.

"Then the insert is put in, they bring the press down over it, and it forms that shell over the insert.

"Q. We have an exhibit here that shows that, I think. Exhibit D has been offered in evidence.

"A. Well, that shell is brought over that insert and formed around it. Then the cap—

"Q. Pardon me before you go any further. At that stage, is there any pressure between the circular opening of the shell and the insert?

"A. No. That is to get the insert into the shell.

"Q. Continue.

"A. And then the cap is put on, slipped on there, and the insert is used as a die to curl the lower part of that cap up into the curl of the knob.

"Q. At that point does the flange of the cap slide easily between the insert and the outside shell as shown in Exhibit D?

"A. Yes. It fits freely into that.

"Q. So that there is more space between the insert and the shell than the thickness of the flange on the cap? A. That's right.

"Q. Then after you have used the central insert as an anvil or die to flare the flange on the cap outwardly, what is the next step in making the accused structure?

"A. Well, that is the finished part then. The insert is not really used to do anything from there on out.

"Q. Isn't there a crimping process after that between the cap and the shell? A. Yes.

"Q. You didn't mention that.

"A. After this shell is wrapped around and the insert is in, then the cap is put in and the insert is used as merely a die to fold that flange up underneath the rounding on the top of the shell.

"Q. After that is done, is there another die that presses the shell inwardly against the cap?

"A. No. The cap is actually spread out on that insert.

"Q. It seems to me I remember Mr. Hillgren testified in his deposition there was another step there. There was a die used to compress the shell.

"A. Well, yes.

"Mr. Miller: I think this is leading. I object to it.

"The Court: Sustained. The answer may go out.

"Q. (By Mr. Jamieson): Is there a die that is used to compress the shell? A. Yes.

"Q. Describe that die.

"A. Well, it is just a die about the same shape as this knob and the cap is put in there and it is brought down, it pushes the cap down and the shell in at the same time.

"Q. Before that die is used, is there any pressure between the shell and the cap, or is it a loose fit?

"A. It is a loose fit.

"Q. And the tight fit between the shell and the cap is acquired by that die, is that right?

"A. Yes, that's right."

Whether Lord intended to testify that lateral pressure was applied to the sides of the shell as well as the downward pressure on top of the cap is not clear. In one instance he denies that there is "another die that presses the shell inwardly against the cap." In a later instance he states that there is "a die about the same shape as this knob and the cap is put in there and it is brought down, it pushes the cap down and the shell in at the same time." Insofar as Lord's testimony relates to applying inward pressure to the sides of the shell, it is in conflict with the Seaholm patent, and this conflict must have been resolved by the Trial Court in favor of holding that no lateral pressure was

applied. The Court has already made findings indicative of the fact that the Trial Court did not regard the witness Lord as being credible. Note for example the findings 20, 21, 22, 23, and 24 (R. 27 and 28) which are contrary to the testimony of Lord.

The Appellate Court has made a serious error in undertaking to review the evidence and accept the Lord version of how the Hillgren knob is made at the middle of page 780 of the record concerning a matter that is in dispute. Rule 52(a) indicates that this cannot be done.

It is a matter of public interest to determine when an Appellate Court can disregard the express provisions of Rule 52(a), review the evidence on a disputed issue of fact and accept the version of one witness of one of the litigants as to how a certain structure is made where the Trial Court, who saw and heard the witness and who has ruled him to be incredible has refused to accept that version.

CONCLUSION

This Court is asked to review the decision of the Ninth Circuit for the purpose of determining when a Court of Appeals is justified in ignoring the express provisions of Rule 52(a). The excuse given is that the records and exhibits enable the Court to *"clearly comprehend"* the issue and thus be in a position to pass on the question just as well as the Trial Court. However, the opinion indicates clearly that the Appellate Court did not possess the clear comprehension of how the patented knob was made and attributes to it a tight fit between the curl and the insert prior to the application of the cap. This is not true and the conclusion of non-infringement based upon this distinction should not follow. The Trial Court's findings of infringement should not be set aside.

Furthermore, the Court in placing its own interpretation on the word "annular" is placing an interpretation upon this word inconsistent with the interpretation placed upon it by the very Examiner who allowed it in the Kwikset claims.

A review and reversal of the Court of Appeals is respectfully urged.

Respectfully submitted,

FRED H. MILLER, Esq.,
Attorney for Petitioner,
Kwikset Locks, Inc.

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA,
County of Los Angeles.—ss:

FRED H. MILLER, being duly sworn, deposes and says that he is the attorney for the Petitioner for a Petition for Cross-Writ of Certiorari; that he has read the foregoing petition and knows the contents thereof, and that the same is well founded in law and fact in affiant's opinion, and is not presented for purposes of delay.

FRED H. MILLER

Subscribed and sworn to before me,
this 5th day of May, 1954.

HELEN WEIGHTMAN

Notary Public in and for the above
County and State.

My Commission expires March 6, 1956.